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Mr Pres. Davis

Submitted
13 Dec

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 180.

M. M. WELTON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

FILED MAY 18, 1875.

R. Fuller

SUPREME COURT OF THE UNITED STATES.

No. 180.

M. M. WELTON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

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1 The President of the United States of America to the State of Missouri, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington City, D. C., on the second Monday of October, A. D. 1874, pursuant to a writ of error filed in the clerk's office of the supreme court for the State of Missouri, wherein M. M. Welton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Washington Adams, chief-justice of the supreme court of Missouri, this fourth day of February, A. D. 1874.

WASHN. ADAMS,
Chief-Justice Supreme Court of Mo.

Service of the within is hereby acknowledged.
Feb'y 4th, 1874.

H. CLAY EWING,
Atty. Genl. Mo.

Service of the within is hereby accepted.

SILAS WOODSON,
Gov. of Mo.

FEBRUARY 4TH, 1874.

(Indorsed:) State of Missouri, D. E., vs. M. M. Welton, P. E. Citation. Filed Feb. 4th, 1874. Henry W. Ewing, clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the January term, 1874, thereof, between the State of Missouri, defendant in error, against M. M. Welton, plaintiff in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington City, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States, this fourth day of February, in the year of our Lord one thousand eight hundred and seventy-four.

Issued at office in the city of Jefferson, with the seal of the circuit

court of the United States for the western district of Missouri, dated as aforesaid.

[SEAL.] M. M. PRICE,
Clerk C. C. U. S., Western District of Mo.

Allowed by Washn. Adams, P. judge of the supreme court of the State of Missouri, this 4th Feb'y, 1874.

State of Missouri, ss:

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, in obedience to the mandate of the within writ, herewith transmit to the honorable Supreme Court of the United States, at Washington, a full, true, and complete transcript of the record and proceedings in the within-entitled cause, as fully as the same remain of record and on file in my office.

In testimony whereof I hereto set my hand and affix the seal of said court at office in the city of Jefferson this 15th day of April, A. D. 1874.

[SEAL.] HENRY W. EWING, *Clerk.*

(Indorsed:) State of Missouri, D. E., vs. M. M. Welton, P. E. Writ of error to the supreme court of Missouri. Filed Feb. 4th, 1874. Henry W. Ewing, clerk.

3 *Transcript filed in the Sup. Ct.*

STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the 6th day of January, eighteen hundred and seventy-three, a transcript was filed in the office of the clerk of the supreme court of the State of Missouri, which is in words and figures following, to wit:

Transcript.

STATE OF MISSOURI,
County of Henry, ss:

Pleas in the circuit court within and for the county of Henry, 22nd judicial circuit, State of Missouri, begun and held at the court-house, in the town of Clinton, in said county of Henry, on the ninth Monday after the second Monday in June, being the 12th day of August, A. D. 1872.

Present, honorable David McGaughey, judge, W. N. Pickerell, cir. atty., Jno. Curtis, sheriff, and Jno. A. Driggs, clerk.

Sheriff and deputies sworn.

And now at this day comes Jno. Curtis, sheriff of Henry County, Missouri, as well as Robert F. Stevenson, Jas. M. Spangler and Victor A. Wallace, his deputies, to whom is administered the oath required by statute in relation to the summonning and returnning of jurors.

List of grand jurors.

And afterwards comes again on this day the said John Curtis, sheriff of Henry County, and returns the following pannel of jurors, summoned by him by virtue of the venire facias to him directed, to wit: A. M. Rhoads, M. B. Merritt, W. H. McLane, Dr. W. T. Thornton, A. C. Clark, John Wrightman, John A. Wells, Wm. Mullins, Wm. Paul, Freeman Dunning, Joseph Bozarth, W. H. Owen, G. W. Bayles, Fisher

Finks, Jas. H. Webster, H. B. Collins, C. F. Collins, and David Moore.

4 And thereupon Wm. Paul is by the court appointed foreman, the jury is empannelled and sworn, and after receiving their charge from the court retire to their room to consider of their presentments.

Indictment presented.

And afterwards, on the 13th day of August, 1872, at the term of court aforesaid, it being the 2nd day of the term, come again said jury, and present, among others, an indictment against one M. M. Welton, which said indictment is in the words and figures following, to wit:

Copy of indictment.

"In the circuit court, August term, 1872.

"STATE OF MISSOURI,
"*County of Henry, ss:*

"The grand jurors of the State of Missouri, for the body of Henry County, upon their oath present, that one M. M. Welton, on the 18th day of May, 1872, at the county of Henry aforesaid, unlawfully deal, in the selling of goods, wares, and merchandise other than books, charts, maps, and stationery, by going from place to place to sell the same, in the selling of sewing-machines not the growth, product, or manufacture of this State, without a license first had and procured from the said county authorizing the same, against the peace and dignity of the State.

"W. N. PICKERELL,
"*Circuit Atty.*"

And which indictment is endorsed on the back as follows, to wit: The State of Missouri against M. M. Welton. Witness, Jno. Wrightman. A true bill. Wm. Paul, foreman. Filed Aug. 13th, 1872. Jno. A. Driggs, clk. Indictment for peddling without license.

5 And afterwards, on the 17th day of December, A. D. 1872, at the December , A. D. 1872, of the circuit court of Henry County, Missouri, before Honorable David McGaughey, judge of said court, the following among other proceedings were had and made of record, to wit:

Trial.

THE STATE OF MISSOURI } *vs.* M. M. WELTON, DEFT. } On indictment for peddling without license.

Now at this day comes W. N. Pickerell, circuit attorney, 22d judicial circuit, State of Missouri, who prosecutes for and in behalf of the State, and this cause coming on for trial, comes also said defendant, in his own proper person and by attorney, and said defendant being asked how he will acquit himself of the charge in said indictment found, for answer saith he is not guilty in manner and form as he stands charged in said indictment, and of this he puts himself upon the country.

Verdict.

And thereupon, by consent and agreement, this cause is submitted to the court, sitting as a jury upon the evidence offered, in consideration whereof the court doth find the defendant guilty, and doth assess his punishment at a fine of fifty dollars.

Judgment.

It is therefore considered, ordered and adjudged by the court that the State of Missouri have and recover of the defendant, M. M. Welton, the sum of fifty dollars as assessed against him as a fine, as aforesaid, as well as his costs in this behalf expended, and that said defendant stand committed until said fine and costs are paid.

Motion for new trial filed.—Overruled.

6 And afterwards, on this day, comes again the said defendant, by his attorney, and files herein his motion for a new trial in this cause; and said motion being now here by consent taken up, and being seen and heard by the court, it is ordered by the court that said motion be overruled, to which ruling and order of the court the defendant, by his counsel, now here excepts at the time.

Motion in arrest filed.—Overruled.—Bill of exceptions filed.

And afterwards, on this day, comes again the said defendant, by his attorney, and files herein his motion in arrest of judgment in this cause; and said motion being now here by consent taken up, and being seen and heard by the court, it is ordered by the court that said motion be overruled, to which orders of the court in overruling said motions defendant, by his counsel, now here excepts, and files his bill of exceptions, and prays that they be signed and sealed and made a part of the record in this cause, and which are in the words and figures following, to wit:

In the Henry County circuit court, December term, 1872.

Bill of Exceptions.

THE STATE OF MISSOURI
vs.
M. M. WELTON, DEFT. } Bill of exceptions.

Be it remembered that on the trial of this cause the following proceedings were had:

The defendant was arraigned and entered a plea of "not guilty."

The defendant then admitted that the facts charged in the indictment were all true in manner as charged, but claimed a right to peddle, because the law imposing a license upon the vocation of peddling is invalid and void.

Whereupon the court, sitting as a jury, found the defendant guilty, and assessed the fine at fifty dollars.

7 The defendant thereupon immediately filed his motion to set aside the verdict and judgment and for a new trial, to wit:

In the Henry County circuit court, December term, 1872.

THE STATE OF MISSOURI
vs.
M. M. WELTON.

Now comes the defendant herein and moves the court to set aside the

verdict and judgment entered into in this cause and grant a new trial for the following reasons: That the verdict is against the law and evidence.

M. M. WELTON.
Per S. N SMITH,
His Atty.

And also a motion in arrest of judgment, to wit:

In the Henry County circuit court, Dec. term, 1872.

THE STATE OF MISSOURI }
vs. }
M. M. WELTON. }

Now comes said defendant and moves the court to arrest the judgment in this cause for the following reasons:

1st. That upon the record said judgment is erroneous.

2nd. That the indictment in this case is insufficient in law in this: that the law upon which this indictment is founded, to wit, chapter 96, General Statutes of Missouri, section 1 and 8, is unconstitutional and void, because in conflict with the provisions of the Constitution of the United States, sections 8 and 10 of article 1 of said Constitution.

M. M. WELTON.
Per S. M. SMITH,
His Atty.

Which said motions the court overruled, to which ruling and order of the court the defendant then and there excepted at the time.

8 The defendant therefore, on the same day, prays the court to allow and sign this bill of exceptions, and that they may be made part of the record, which is done this 17th day of December, 1872.

(Signed) DAVID McGAUGHEY,
Circuit Judge.

And afterwards, on this day, comes again said defendant and files his affidavit for an appeal, and his said affidavit being seen and heard by the court, it is ordered that an appeal be granted in this cause to the supreme court of the State of Missouri.

And thereupon comes again said defendant and files herein his appeal bond, which, being seen and heard by the court, is by the court approved, which said bond is in the words and figures as follows, to wit:

Bond.

Know all men by these presents, that we, M. M. Welton, as principal, and Thomas M. Cochrane, as securities, are held and firmly bound unto the State of Missouri in the penal sum of one hundred and seventy-five dollars, to be levied of their goods and chattels, lands and tenements, to be void upon this condition, however, that whereas the above bounden M. M. Welton has appealed from the judgment of the circuit court of Henry County, Missouri, in the cause of the State of Missouri against the said M. M. Welton on an indictment for peddling without license: Now, therefore, if the said M. M. Welton shall prosecute his appeal without delay to a judgment in the supreme court, and shall appear in the circuit court of Henry County, Missouri, at such time and place as

the supreme court shall direct, and render himself in execution,
9 and obey every order and judgment which shall be made on the premises, then this obligation to be void; otherwise to remain in full force and effect in law.

Witness our hands and seals this 17th day of December, A. D. 1872.

M. M. WELTON. [SEAL.]
THOS. M. COCHRAN. [SEAL.]

Witness for M. M. Welton:
J. U. SEGREN.

And thereupon it is ordered by the court that the appeal in this court operate as a stay of proceedings on the judgment until final determination in the supreme court, and that defendant go hence on his bonds.

Certificate of clerk.

STATE OF MISSOURI,
County of Henry, ss:

I, John A. Driggs, clerk of the circuit court within and for the county of Henry, in the 22nd judicial circuit, State of Missouri, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in the cause therein named, including the bill of exceptions, judgment, and bond of defendant.

Witness my hand as clerk of our said court, and the seal thereof, hereto affixed at office in Clinton, this 19th day of February, A. D. 1873.

[SEAL.] (Signed) JNO. A. DRIGGS, *Clerk.*
By SAML. B. OREM, *Deputy.*

10 *Cause submitted in Sup. Ct. Mo.*

And afterwards, to wit, at the January term of the supreme court of the State of Missouri, A. D. 1874, the following further proceedings were had in said cause, to wit:

MONDAY, *January* 12, 1874.

STATE OF MISSOURI, RESPONDENT,
vs.
M. M. WELTON, APPELLANT.

Now at this day come the parties aforesaid, by their respective attorneys, and submit this cause to the consideration of the court on their printed statement and briefs, under Rule XVII of the rules of said court.

And afterwards, to wit, at the same term of said court, the following judgment was rendered in said cause, to wit:

Judgment.

MONDAY, *January* 26, 1874.

STATE OF MISSOURI, RESPONDENT,
vs.
M. M. WELTON, APPELLANT.
} Appeal from Henry County cir. ct.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and con-

cerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid, by the said circuit court rendered, be in all things affirmed, and stand in full force and effect. And it is further considered and adjudged by the court that the said respondent recover against the said appellant their costs and charges herein expended, and have therefor execution.

And afterwards, to wit, at the January term of said court, the following opinion was delivered in said cause, to wit:

Opinion.

11 MONDAY, *Jan.* 26, 1874.

STATE OF MISSOURI, RESPONDENT,
vs.
M. M. WELTON, APPELLANT. } Opinion of the court.

The defendant was indicted for selling goods without license and found guilty, but claimed that the act requiring him to take out a license was unconstitutional, because it discriminated in favor of articles the growth and produce of this State. The act in question in its first section declares that "whoever shall deal in the selling of patent or other medicines, goods, wares, & merchandise, except books, charts, maps, and stationery, which are not the growth, product, or manufacture of this State, by going from place to place to sell the same, is declared to be a peddler;" and no one is allowed to deal as a peddler without a license. The 7th section of the law provides, the tax to be paid for such license shall be regulated as follows: First. If the peddler travels and carries his goods on foot, he is to pay three dollars for a six months' license; if he uses one or more horses or other beasts of burthen, he is required to pay ten dollars for every six months; if a cart or other land carriage is used to convey the goods, he pays twenty dollars for every period of six months, and if the goods are conveyed on a boat, or other river vessel, he pays at the rate of one dollar per day, &c.

It is now claimed that the tax on those licenses is a discriminating tax, exempting the home-made articles, and under the guise of a license taxing the goods which are the growth, manufacture, or product of other States, and the decisions of this court in Crow vs. The State, 14
12 Mo. R., 237, and State vs. North & Scott, 27 Mo. R., are invoked to sustain this position.

But we are unable to see the applicability of these cases to the act concerning peddlers. If these cases were applicable, I would certainly adhere to the opinion which I gave in those cases, because the opinions there expressed are in conformity with my present views and in accordance with the views of my present associates. But it is unnecessary so to decide.

The merchants' licenses, discussed in those cases, were, as they are now, mere modes of taxation upon property, and the validity of such taxation necessarily arose. The law now in question is manifestly simply a tax on a calling, and the amount of the tax is not affected by the value of the property authorized to be sold under it. This calling or profession is limited to the sale of merchandise which is not the growth or manufacture of this State, and is thus defined in the act. The cost of the licenses is not affected at all by the value of the goods peddled, but by the mode in which the business is conducted. The peddlers who travel on foot are not required to pay as much for a license as those who use horses or mules or conveyances by land or water. There is no

tax, direct or indirect, on property of any kind. The foot-peddler gets a license for a smaller sum than the wagon or steamboat peddler, although the foot-peddler may have in his pack the most costly goods, such as jewelry or lace. The law disregards the value of the goods in fixing the amount of the license.

The decisions of this court in the cases referred to have no bearing on this case. The case of Ward vs. Maryland, 12 Wallace, decided by the Sup. Court of the United States, is also totally foreign to the case,
13 but the intimations of Judge Clifford, who delivered the opinion in that case, sustain my position in the cases of Crow vs. The State and State vs. North & Scott.

That case turned upon the construction of a clause in the Constitution of the United States which provided that "the citizens of each State should be entitled to all the privileges and immunities of citizens of the other States." The law in question discriminated between citizens of Maryland and citizens of other States pursuing the same calling in Maryland, and levied a higher tax upon the non-resident peddler. But there is no such feature in our law. Whether the peddler comes from Maine or Louisiana, or has been born and lived here all his life, makes no difference in the tax he pays for a peddler's license.

The case of Crandall vs. The State of Nevada, 6 Wallace, and the cases of Woodruff vs. Parham and Harmon vs. Scott, 8 Wallace, have no bearing on the points of this case.

It cannot be pretended that this statute concerning peddlers' license is an attempt to regulate inter-State commerce. It applies solely to the internal commerce of this State. No discrimination is made against the peddler because he comes from other States. It is merely enacted that a peddler is one who deals in articles manufactured elsewhere than in Missouri, and he is required to take out a license. Nothing is said or enacted concerning persons who do not deal in such articles or merchandise. There are other laws which tax all the property of citizens of the State. This law is no taxation on property at all, either directly or indirectly. It is simply a tax on a calling or profession, and as such its validity cannot be questioned. (Nathan vs. Louisiana, 8 How. 73.)

14 The judgment is affirmed; all the judges concur.

(Signed) W. B. WAPTON.

Which said opinion is endorsed as follows: State of Missouri, respondent, vs. M. M. Welton, appellant. Opinion of the court. Napton. Filed Jan. 26, 1874. Henry W. Ewing, clerk. Affirmed.

And afterwards, to wit, at the same term of said court, the following further proceedings were had in said cause, to wit:

Writ of error filed.

FEBRUARY 4TH, 1874.

STATE OF MISSOURI, RESPONDENT,
vs.
M. M. WELTON, APPELLANT.

Now again comes the appellant, by his attorney, and files his writ of error from the Supreme Court of the United States in this cause, which is allowed. Citation filed.

Bond filed & approved.

Bond filed and approved; which bond is in words and figures following, to wit:

Bond in Sup. Ct.

Know all men by these presents, that we, M. M. Welton, of County, State of Missouri, as principal, and Augustus Sumner & Jacob S. Merrell, of St. Louis County, in said State, are held and firmly bound unto the State of Missouri in the full and just sum of five hundred dollars, to be paid to the said State of Missouri, heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this second day of February, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at the January term, A. D. 1874, of the supreme court of the State of Missouri, in a suit pending in said court between the State of Missouri, plaintiff, and M. M. Welton, defendant, judgment was rendered against the said M. M. Welton, defendant, and the said M. M. Welton having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Missouri, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next;

Now, the conditions of the above obligation is such that if the said M. M. Welton shall prosecute said writ to effect, and answer all penalties, damages, and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

AUGUSTUS SUMNER. [SEAL.]
(Signed) JACOB S. MERRELL. [SEAL.] [SEAL.]

Approved by Wash. Adams, P. J., this 4th Febr'y, 1874.

STATE OF MISSOURI,
County of St. Louis, ss:

Augustus Sumner, whose name is subscribed to the within bond as surety, being duly sworn, upon his oath says that he is the owner, in his own right, of unincumbered real estate and personal property in said county of St. Louis, to the amount of one hundred thousand dollars over and above all liabilities and subject to execution.

(Signed) AUGUSTUS SUMNER.

Sworn to & subscribed before me this 3d day of February, 1874.
[SEAL.] (Signed) J. THORNBURGH,
Clk. Sup. Court, held at St. Louis, of the State of Mo.

STATE OF MISSOURI,
Caunty of St. Louis, ss:

Jacob S. Merrill, whose name is subscribed to the within bond as surety, being duly sworn, upon his oath says that he is the owner, in his own right, of unincumbered real estate and personal property in

said county of St. Louis, to the amount of one hundred thousand dollars over and above all liabilities and subject to execution.

JACOB S. MERRILL.

Sworn to and subscribed before me this 3 day of February, 1874.

[SEAL.] (Signed) J. THOBNBURGH;

Clk. Sup. Court, held at St. Louis, of State of Mo.

Which said bond is endorsed as follows: State of Missouri, respondent, vs. M. M. Welton, app'llant. Bond. Filed February 4, 1874. Henry W. Ewing, clerk.

17 *Clerk of Sup. Ct., certificate.*

STATE OF MISSOURI, *ss:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings had in the above-entitled cause, as fully as the same remains of record and on file in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office in the city of Jefferson, this 18th day of April, A. D. 1874.

[SEAL.] HENRY W. EWING,

Clerk of the Sup. Court.

(Indorsement on cover:) No. 180. M. M. Welton, plaintiff in error, vs. The State of Missouri. Missouri sup. ct. Filed 18th May, 1874.

IN THE SUPREME COURT,

Of the United States,

OCTOBER TERM, 1875.

M. M. WELTON, *Plaintiff in Error.*

vs.

The State of Missouri, *Defendant in Error.*

Error to the Supreme Court of Missouri.

Statement, Assignment of Errors, and Argument for Plaintiff in Error, by

JAS. S. BOTSFORD,

Jefferson City, Missouri.

IN THE SUPREME COURT,

Of the United States.

OCTOBER TERM, 1875.

M. M. WELTON, *Plaintiff in Error.*

vs.

The State of Missouri, *Defendant in Error.*

Error to the Supreme Court of Missouri.

STATEMENT OF THE CASE.

On March 5, 1845, the Legislature of Missouri enacted the following provisions concerning peddlers:

SECTION 1. Whoever shall deal in the selling of goods, wares and merchandise, other than the growth, produce and manufacture of this State, by going from place to place to sell the same, is declared to be a peddler.

Sec. 2. No person shall deal as a peddler without a license, and no two or more persons shall deal under the same license, either as partners, agents, or otherwise; and no peddler shall sell wines or spirituous liquors.

* * * * * * * * *

SEC. 7. There shall be levied and paid on all peddlers' licenses (except clock peddlers) a state tax of the following rates: First. If the peddler travel and carry his goods on foot,

three dollars for every period of six months. Second, if on one or more horses, or other beasts of burden, ten dollars for every period of six months. Third, if in a cart or other land carriage, twenty dollars for every period of six months. Fourth, if in a boat or other river vessel, at the rate of one dollar per day for any period not less than five days; and such license may be renewed, at the expiration of the first license, for any period not greater than six months, on payment of fifty cents a day, the number of days to be specified in such license.

SEC. 8. Every person who shall be found dealing as a peddler contrary to law or the terms of his license shall forfeit, if a foot peddler, the sum of ten dollars; on one or more beasts of burden, twenty-five dollars; in a cart or other land carriage, fifty dollars; in a boat or other vessel, one hundred dollars

These provisions have continued in force since the date of their enactment, they having been re-enacted in the revisions of 1855 and 1865 (Rev. Stat. 1845, p 778, 2 Rev. Stat. 1855, p 1128; Rev. Stat. 1865, p 417; 2 Wag. Mo. Stat. 1872, p 979), but in the revision of 1865, those provisions of the original act requiring clock peddlers to obtain licenses was repealed, and the first section was amended by inserting after the words "selling of" and before "goods, wares and merchandise," the words "patent or other medicines," and after the words "goods, wares and merchandise," and before "other than the growth," the words "except books, charts, maps and stationery." The statute as thus amended in 1865 is still in force, and there has been no law since the revision of that year requiring any persons engaging in the business of peddling, except such as "deal in the selling of patent or other medicines, goods, wares and merchandise, which are not the growth, produce or manufacture of this State," to have a peddlers license.

By an "Act to license and tax merchants," approved March 25, 1845, (Rev. Stat. 1845 p 737,) the same legislature enacted the following provisions:

SEC. 1. Every person, or co-partnership of persons, who shall deal in the selling of goods, wares or merchandise, at any store, stand or place occupied for that purpose, is declared to be a merchant.

SEC. 2. No person, or co-partnership, shall deal as a merchant without a license first obtained according to law; and every person, or co-partnership, so offending, shall forfeit to the State not less than fifty, nor more than five hundred dollars for every such offense.

SEC. 5. Before any person, or co-partnership, shall receive a license to vend merchandise, he or they shall deliver to the Collector of the proper county, an aggregate statement, in writing, of the amount of all goods, wares and merchandise (except such as are the growth, produce, or manufacture of this State) received at his or their store, stand or warehouse, for retail, for the last six months next preceeding the application for such license.

SEC. 8. There shall be levied upon every such license, to be paid to the Collector before the delivery thereof, as follows: First, where the amount of merchandise, received for sale as aforesaid, does not exceed the amount of five thousand dollars, the sum of ten dollars. Second, where the amount of merchandise received for sale aforesaid, exceeds the value of five thousand dollars, but is less than ten thousand dollars, the sum of fifteen dollars. Third, when the amount of merchandise, received for sale as aforesaid, is as much in value as ten thousand dollars, but less than fifteen thousand dollars, the sum of twenty dollars. Fourth, when the amount of merchandise received for sale as aforesaid, is as much in value as fifteen thousand dollars, the sum of twenty-five dollars.

SEC. 10. The Collector shall collect, as an *ad valorem* tax, such per centum upon all merchandise offered for sale as aforesaid, (except such as may be offered in the packages, boxes, bales, barrels or crates in which they were imported, or in which they may have remained without being broken,) such an amount as may, for the time being, be paid as a tax upon real estate.

These latter provisions were, in 1851, adjudged void, as being repugnant to the Constitution of the United States, by the Supreme Court of the State, in Crow vs. Missouri, (14 Mo. 290,) per Ryland J., Birch J. concurring, and Napton J. dissenting.

In 1855 (Rev. Stat. 1855 p 1072) the legislature, in consequence, as it is supposed, of this decision, enacted a new law to tax and license merchants, but it was substantially the same as the act which had been declared invalid, and was, in 1858, likewise adjudged void by the same Court, in State vs. North & Scott, (27 Mo. 464,)per Scott J., Richardson J. concurring and Napton J. dissenting.

Similar provisions relative to dram shop keepers and grocers were enacted by the same legislature, (Rev. Stat. 1845 § 11 p 543,) but in the revision of 1855, the words "not the growth

or manufacture of this State" were omitted, (Rev. Stat. 1855 § 7 p 684,) and none of these statutes were continued after the revision of 1865; except, as before stated, the statute concerning peddlers, under which the plaintiff in error, on August 13, 1872, was indicted in the Circuit Court of Henry county, Missouri, a Court invested by law with criminal jurisdiction. The indictment charged that the plaintiff in error did "unlawfully deal in the selling of goods, wares and merchandise other than books, charts, maps and stationery, by going from place to place to sell the same, in the selling of sewing machines not the growth, product or manufacture of this State without a license first had and procured." To this indictment the plea of not guilty was entered. On the trial, which by consent was had before the Court without the intervention of a jury, it was admitted that the facts charged in the indictment were true, but the right to a verdict and finding of not guilty was claimed on the ground that the foregoing statute concerning peddlers on which the indictment in the case was based, was void. Notwithstanding this claim, the Court found the plaintiff in error guilty, and assessed a fine of fifty dollars against him, for which judgment was rendered.

Motions for a new trial, and in arrest of judgment, were filed based on the ground that the indictment was insufficient in law in the respect that the law on which it wss founded was unconstitutional and void, because in conflict with the provisions of the Constitution of the United States, sections eight and ten of article one thereof. These motions were overruled and exceptions saved. Thereupon the cause was removed by appeal to the Supreme Court of the State, the highest Court of law therein, in which a decision in the case could be had, and in which the judgment of the Circuit Court was. on final hearing, affirmed (State vs. Welton, 55 Mo. 288;) the Court, per Napton J. holding that the foregoing provisions relative to peddlers were not in conflict with the Constitution of the United States, but were valid. To reverse this judgment, the case has been brought, by writ of error, to this Court under the twenty-fifth section of the judiciary act.

ASSIGNMENT OF ERRORS.

And now at this day comes the said plaintiff in error by his attorney and assigns the following errors:

I. The Henry County Circuit Court erred in finding the plaintiff in error guilty.

II. Said Circuit Court erred in rendering judgment against him.

III. Said Circuit Court erred in not sustaining, and in overruling the motions for a new trial, and in arrest of judgment.

IV. The Supreme Court of Missouri erred in not reversing, and in affirming, the judgment of said Circuit Court, and in adjudging said provisions of law, concerning peddlers as not being in conflict with the Constitution of the United States.

Wherefore said plaintiff in error prays that the said judgments of said Supreme and Circuit Courts be reversed, annulled, adjudged void and for naught held and esteemed, and that this Court proceeding to render such judgment as should have been rendered herein by the Court below, adjudge that the indictment herein be dismissed and that said plaintiff in error go hence without day and be restored to all he has lost by said judgments.

JAMES S. BOTSFORD,
For plaintiff in Error.

BRIEF AND ARGUMENT.

The first, second, seventh and eighth sections of the act of the Legislature of Missouri, concerning peddlers, approved March 5, 1845. as amended by the Revised Statutes of 1865, are in conflict with that provision of section eight of the first article of the Constitution of the United States which ordains that "the Congress shall have power to regulate commerce with foreign nations and among the several States."

(Crow vs. Missouri, 14 Mo. 290;
State vs. North & Scott, 27 Mo. 464;
2 Story on the Constitution, (4 Ed.) § 1056 to 1076;
Corfield vs. Coryell, 4 Wash. C. C. 371;
Gibbons vs. Ogden 9 Wheat, 1;
Brown vs. Maryland, 12 Wheat, 419;
Almy vs. California, 24 How. 169;
Crandall vs. Nevada, 6 Wall, 35;
Woodruff vs. Parham, 8 Wall. 123;
Hinson vs. Lott, Ib. 148;
Ward vs. Maryland, 12 Wall. 418;
Railroad Co. vs. Pennsylvania, 15 Wall. 232;
Railroad Co. vs. Richmond, 19 Wall. 589.)

The discussion of this proposition involves the following questions:

I. Do the sections referred to constitute a regulation of commerce with foreign nations or among the States?

II. If they do, is the commerce regulated of such a character as to come within the exclusive power of Congress?

What is commerce? It is the settled law of this Court that that word, as used in the Constitution, embraces navigation and transportation. (Gibbons vs. Ogden, 9 Wheat. 189; Railway Co. vs. Pennsylvania, 15 Wall. 232.) It includes,

according to the familiar definition of Washington J. in Corfield vs. Coryell, intercourse with foreign nations and among the States, and the means by which it can be carried on, whether by the free navigation of the waters of the several States, or by a passage overland through the States. Commerce with foreign nations, says Chief Justice Marshal in Gibbons vs. Ogden, has been universally admitted to "comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it."

Speaking in the same connection of commerce among the States, he says:

"The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States can not stop at the external boundary line of each State, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is *completely* internal, which is carried on between man and man in a State, or between different parts of the same State, *and which does not extend to or affect other States.*"

It is not possible to draw the line which will, in every case that may arise, precisely mark the boundaries between inter-State, commerce and the internal commerce of a State, or to lay down any general rule by which to determine, in all cases, just where the former ends and the latter begins.

The transportation from one point to another in the same State, of its own manufactures or products, together with their sale at either point, should perhaps be treated as a part of its internal commerce; while the taking up of such articles for transportation beyond its limits to another State, would doubtless render such transportation, and a sale, either at the point from or to which the goods transported are removed, a part of that commerce which the Constitution characterizes as "among the several States." Whatever may be thought of the correctness of these views, it would seem to admit of no doubt

that if such transportation were destined for some point in a foreign nation, it would then, with the purchase and sale of the goods exported, compose an ingredient of commerce "with foreign nations;" and if this be true it is submitted that no good reason exists why the same is not true of the other proposition. Conceding these principles to be correct, it results that the sale, within a State, by wholesaling, peddling or in any other mode known to the commercial world, of goods imported from a foreign nation, or manufactured in any one of the thirty-six sister states, is an element of foreign or inter-state commerce, equally as important and essential as the importation or transportation into the state of such goods. This result is undoubtedly supported by the remarks of Chief Justice Marshal in Brown vs. Maryland (12 Wheat 446.) He says:

"What then is the just extent of a power to regulate commerce with foreign nations and among the several states. This question was considered in the case of Gibbons vs. Ogden (9 Wheat 1,) in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts, and can not be stopped at the external boundary of a state, but must enter its interior. We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned. If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell."

And in the same case it was said: "It may be proper to

add that we suppose the principles laid down in this case to apply equally to importations from a sister state." This use of the word "importations" was criticised in Woodruff vs. Parham, (8 Wall 139,) but the correctness of the remark, with this exception, was there assented to. The questions whether intermediate sales made after the first sale by the introducer of the goods, and before they reach the consumer, are subjects of foreign or inter-state commerce, and are embraced in the traffic, which is included in such commerce; or whether they are ingredients of that commerce which is "completely internal," and "which does not extend to or affect other states," need not be discussed. Such questions are not practical in this case. The State of Missouri is concluded by the form of its legislation from raising them, even though it were conceded that the latter must be answered in the affirmative.

Ryland J. in Crow vs. Missouri (14 Mo. 311) says: "Now, it must be admitted that there is great difficulty in laying down any fixed rule, adapted to all cases, which will sufficiently designate when imported goods have lost their character as such, when they have fully ceased to claim the protection of Congress, and may rightfully demand the protection of state laws.

The difficulty on this point, is not peculiar to the case before us, but is common to the entire subject matter of legal adjudication, where the condition of persons or property is dependent on questions of conflicting jurisdictions, embarrassed by questions of intention. But it seems to me the Legislature of Missouri has relieved the case of any difficulty on this head. They have signified their will, that no goods, wares or merchandise, the production, growth or manufacture of any place out of the limits of Missouri, shall ever mix with the common property in this state; shall ever be placed on a footing with other property in the state, so long as it remains in the merchant or grocer. They have denounced it as separate in its nature; as worthier of heavier burdens, and a peculiar restrictive system of taxation, known to no other property in the state, and all this because it is foreign; has been imported into the state, either from foreign nations or from sister states. While they so designate it and treat it, what right have they to say it has mixed with the common property of the state?"

If, then, commerce among the states must be regarded as having the same character, and as composed of the same ingre-

dients, as commerce with foreign nations; and if the sale, including the subject, as well as the act of selling, of importations from foreign nations, and of manufactures or productions from other states, should be treated as composing with their transportation into the state where sold, a part of commerce as that word is used in the Constitution; and if the state of Missouri is concluded from maintaining that goods, wares and merchandise other than the growth, produce or manufacture of this state, when sold by a peddler, have ceased to be foreign and become a part of the common property of the state, there would seem to be no difficulty in holding the selling of such property by a peddler to be a part of that commerce. The legislation of Missouri concerning peddlers embraces goods, wares and merchandise imported from foreign nations as well as those transported from sister states, and if the conclusions stated are supported by the citations given, it must be admitted that the selling designated in the first section of the act is an element and ingredient in both foreign and inter-state commerce.

And this brings us to consider whether that legislation constitutes a regulation of such commerce. And here we are confronted by the proposition of the Supreme Court of Missouri that the tax for the non-payment of which the plaintiff in error was indicted, is "simply a tax on a calling or profession and as such its validity can not be questioned." This, it is contended, is the vice of the decision of that Court.

To support it the Court says: "The cost of the licenses is not affected at all by the value of the goods peddled, but by the mode in which the business is conducted. The peddlers, who travel on foot, are not required to pay as much for a license, as those who use horses or mules, or conveyances by land or water. There is no tax, direct or indirect, on property of any kind. The foot peddler gets a license for a smaller sum than the wagon or steamboat peddler, although the foot peddler may have in his pack the most costly goods, such as jewelry or lace."

That a foot peddler going from place to place may carry and sell jewelry or lace will not be controverted, but common experience tends to teach us that a peddler, conducting his business by means of a horse or cart, could and usually would carry and sell much more of that class of goods, if the peddling of them were profitable, than would be carried and sold by a foot peddler, and that the capacity, in that respect, of a

boat or other river vessel, would far exceed either. And that the Legislature had in mind this difference in the amounts of sales which peddlers, as classified by the statute, would generally make, seems quite clear.

It did not intend to tax the good fortune of a man in being able to own and peddle by means of a horse, cart or steamboat nor did it intend to tax the beast or conveyance used in prosecuting the business; but, making allowance for the increase of sales and profits resulting from peddling with a cart or boat over those resulting from peddling with the use of a horse, or by peddling on foot, it provides for the levying of taxes accordingly. It is true it did not follow the advalorem principle of taxation, in fixing the amounts to be paid, but this fact does not show that the tax is on the avocation and not on the goods.

Nor is the argument of the Court supported by the consideration that, in some instances, the principle underlying the classification made by the statute, *may* be violated by some foot peddler who, through industry, prudence, or other means which statutes can not control, sells more goods than his neighbor who peddles with the use of a cart or boat.

No statute has ever yet been devised which established a perfect rule of equality among all affected by it, and history and our reported decisions teach us that notwithstanding the severity of penal provisions annexed to violations of revenue laws, they are frequently broken or evaded. It is not, then, the mode in which the business of peddling is conducted, but the goods peddled, fixed by general rules suggested by experience and made applicable to all cases, that determines the cost of the licenses.

If the law makers had intended to tax the occupations of peddling, they would have taxed all peddlers. But they do not do this, but require a tax from those only who peddle *importations from foreign nations* or *manufactures or productions from sister states*. The Supreme Court of Missouri does not rest its decision on the argument that because the tax is an avocation tax in form, it is therefore such in substance. The error of that claim has been adjudged by an array of authorities seldom adduced in support of a legal proposition. (Crow vs. Missouri, 14 Mo. 311, 315; State vs. North & Scott, 27 Mo. 480; Brown vs. Maryland, 12 Wheat, 444; Passenger Cases, 7 How. 458; Almy vs. California, 24 How. 173; Ward vs. Maryland, 12 Wall. 429; Railroad Co. vs. Pennsylvania, 15

Wall. 272.) These and other authorities abundantly prove that such a tax as that required of the plaintiff in error is not a tax on the occupation of selling, but a burden on the goods themselves. In Ward vs. Maryland *supra* Mr. Justice Clifford says: "Such an exaction, called by what name it may be, is a tax upon the goods or commodities sold, as the seller must add to the price to compensate for the sum charged for the license, which must be paid by the consumer or by the seller himself; and in either event the amount charged is equivalent to a direct tax upon the goods or commodities." But the argument may be renewed that the State of Missouri has the right by virtue of its sovereign power of taxation, to impose a tax on all the mass of property lying within its limits, including that imported from foreign nations and transported from sister states, and that the tax in question, even if conceded to be a tax on the goods, must be regarded as imposed on them after they lose their original foreign character, and as a part of the common property of the state. That a tax resting equally on all the avocations and property within a state, even though such avocations and property should be held to embrace subjects of both foreign and inter-state commerce may legally be imposed, may be admitted, since such an exercise of the power of taxation would not ordinarily be considered a regulation of commerce. Such an argument, however, applies with little, if any force, to the statute under review in which the vital element of uniformity is wanting, for if its framers had desired revenue for the state, they would doubtless have so framed it as to require *all* peddlers to pay a tax, thereby enabling the state to obtain a larger revenue than by taxing only a designated part.

If there were any importance to be attached to the name, such a statute as is relied upon to sustain the judgment in this case, might appropriately be denominated an act to protect domestic manufactures and products, and to restrict the admission of goods from foreign nations and sister states. But it may be said that the amount of sales of home manufactures, as compared with sales of goods from abroad, were so small as to make, by taxing both, no sensible increase in the revenue. Without entering into the discussion of any such question, it being one of fact, of which the Courts can not take judicial notice, and not perceiving how the fluctuations of business can determine a question of Constitutional law, it would perhaps be a sufficient answer to say that if such were the fact, it af-

fords the best argument why the law should have been made applicable to all peddlers, and not so framed as to exclude a class of persons so small as seldom to be brought within its provisions.

But, however this may be, it may be argued that if the State of Missouri may tax all property and avocations within its limits, it may tax a part, and that the want of uniformity in the act violates no provision of the Federal Constitution. This would be true, did not the absence of that principle cause the act to operate as a regulation of commerce; for with the limitations on the taxing power, of uniformity, and that taxes must be for a public use, which are inherent in the power itself, must be included those which result from the express and implied prohibitions of the organic law, (McCullah vs. Maryland, 4 Wheat., 316.) This statute discriminates against the goods of foreign nations and sister states, and is similar to that passed on in Brown vs. Maryland, which prohibited not only the importer, but all other persons, from selling without a license. To prevent such discrimination and that retaliation among the states which it tends to provoke, the commerce clause of the constitution was created. (Veazie vs. Moor, 14 How., 574; Railroad company vs. Richmond, 19 Wall., 589). The operation of the statute is necessarily such as to compel the people of other nations and states to charge, and the citizens of Missouri to pay, as much more for goods brought into the State from abroad, than is required to purchase those manufactured at home, as it costs to procure the licenses to sell; and the act thereby violates the rights of the citizens of the Union growing out of the constitution and appertaining to the subject of commerce which Congress has regulated by leaving the subject free and unrestricted. (Crow vs. Missouri, 14 Mo., 305; State vs. North & Scott, 27 Mo., 472; Gibbons vs. Ogden, 9 Wheat, 209; Passenger Cases, 7 How., 464; Ward vs. Maryland, 12 Wall., 432). It destroys commercial equality which may be classed as a part of those rights, and prevents that free intercourse among the people of the different states, which the founders of the new government deemed so necessary for their prosperity, and so essential to a more perfect union. If it is a valid exercise of the taxing power, the legislature may wholly exclude importations and products of sister states; for a lawful exercise of that power knows no limitations except such as are to be found in the discretion of the law-makers.

To regulate is to subject to rules or restrictions and the discrimination of the statute makes it a regulation of commerce, a result which would not follow were the tax uniform on all peddlers. Nor can this feature of the act be sustained as lawful on the ground that the tax is imposed after the time when, it may be claimed, the goods taxed have become intermingled with the property of the State. In State vs. North & Scott, 27 Mo., 480, Scott, J., says:

"Can a state lay a discriminating tax on goods after their importation? If it can not do it directly, then the same thing can not be accomplished by any indirect means. The requiring of every dealer in goods which have been imported to take out a license, on which a tax is levied, is the same thing as imposing the tax on the goods themselves.

From the view we have taken of this subject, it will be seen that it is not deemed a matter of any importance whether the power of laying a discriminating tax is exercised on the original package or bale in which the merchandise was imported, or whether it is exercised on the goods themselves after they have been incorporated into the mass of the property of the State. It is obvious that if the laying of a discriminating tax is unconstitutional, the time at which the power is exerted, or the condition of the goods at the time of its exercise, can not change the nature of the act."

But it is unnecessary to pursue this branch of the case further. It is impossible not to regard the statute in question as discriminative, and the conclusion would seem to be irresistable, from the history of similar legislation in Missouri, and the law applicable to the case, that it is both in purpose and effect, a regulation of foreign and inter-state commerce, and that the first question must therefore be answered in the affirmative.

Is the power of Congress over the subject regulated, exclusive? This question is of easier solution than the other. The question as to the nature of the power of Congress to regulate commerce with foreign nations, is not difficult; it being the general, if not universal opinion, that that power is exclusively vested in Congress. The reason of this is plain.

"What would be the language," says Chief Justice Marshal in Brown vs. Maryland, "of a foreign government, which should be informed that its merchants, after importing according to law were forbidden to sell the merchandise imported? What answer would the United States give to the complaints

and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the states is a sufficient security against it. The constitution has not confided this subject to that good sense. It is placed elsewhere." That the power of Congress to regulate commerce among the states is exclusive, is not settled, (Wilson vs. Blackbird, Marsh Co., 2 Pet., 250; Cooley vs. Board of Wardens. 12 How., 318; Gilman vs. Philadelphia, 3 Wall., 726), though it was so decided in Gibbons vs. Ogden. However, it must be now considered as the settled law of this court that whenever the subjects over which a power to regulate commerce is asserted, are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress, (Railroad Co. vs. Pennsylvania, 15 Wall., 279. It would seem impossible to exclude the subjects embraced within the control and regulation of the act under consideration from this class. It affects that branch of our commerce which is national, and which admits of one rule regulating the intercourse of all the states. It shuts out traffic not only with the thirty-six sister states, but with the whole world. It fixes the boundaries of Missouri as a line across which the commerce of the world can not come without paying tribute to the state. It in effect says that the importations of foreign nations and the manufactures of sister states shall not be introduced into this state, however much they may contribute to the happiness and comfort of our people; to the tilling of our soil; the harvesting and shipment to other states and countries of our crops; the development of our mineral resources, and the continuation of those exchanges without which commerce could not exist. It does more than this. It provokes retaliation and teaches to the other states the same lesson of discrimination, which will in time, if sustained, result in making the people of the states separate in identity and feeling, and cause them ultimately to engage in those bitter feuds which so frequently occur among neighboring states, not bound together by common ties of affection and interest. Such considerations certainly tend to prove that the regulation effected by the statute concerns subjects of commerce which are national and not local in their

character, and which do not fall within those that "can be best regulated by rules and provisions suggested by the varying circumstances of different places, and limited in their operation to such localities respectively." (Gilman vs. Philadelphia, 3 Wall., 713).

These principles are supported by the decision of this Court in Hinson vs. Lott, (8 Wall, 152), in which Mr. Justice Miller says: "There is a class of legislation of a general nature, affecting the commercial interests of all the states, which from its essential character is national, and which must, so far as it affects these interests, belong exclusively to the Federal Government. The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all the other states in favor of those of Alabama, in involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation and be forbidden by the clause of the constitution just mentioned."

This is decisive of this branch of the case. In conclusion, it is submitted that both questions must be answered in the affirmative, and that the statute under which the plaintiff in error was indicted must be adjudged void, and the judgments rendered against him reversed.

JAMES S. BOTSFORD,
For Plaintiff in Error.

State Journal Print.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

M. M. WELTON, Plaintiff in Error,

vs.

THE STATE OF MISSOURI, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF MISSOURI.

Brief for Plaintiff in Error.

BY S. M. SMITH, ONE THE ATTORNEYS FOR PLAINTIFF IN ERROR.

Powell & Maynard, Printers, 208 South Fourth Street, St. Louis.

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M. M. WELTON, } Plaintiff in Error.
vs.
THE STATE OF MISSOURI. } Defendant in Error.

ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT OF THE CASE.

Chapter 96, General Statutes of Missouri, or Chapter 106 Wagner's Statutes, contains the law of that state relating to pedlers and their licenses, and is as follows, to-wit:

SECTION 1. "Whoever shall deal in the selling of patent or other medicines., goods, wares or merchandise, except books, charts, maps, and stationery, which are not the growth, produce, or manufacture of this state, by going from place to place to sell the same, is declared to be a pedler."

Section 2. "No person shall deal as a pedler without a license." * * * * * *

Section 7. "There shall be levied and paid on all pedlers licenses, a state tax of the following rates * * * Third, if in a cart or other land carriage, twenty dollars for every period of six months."

Section 8. "Every person who shall be found dealing as a pedler contrary to law or the terms of his license, shall

forfeit, if a foot pedlar, the sum of ten dollars; on one or more beasts of burden, twenty-five dollars; in a cart or land carriage, fifty dollars; in a boat or other vessel, one hundred dollars."

Each county is empowered to levy an additional license, tax on pedlers, which shall not exceed the state revenue tax more than one hundred per centum for the same time. (Session Laws of Missouri for 1872, page 116, sec. 166.)

M. M. Welton, the plaintiff in error was indicted at the August term, 1872, of the Henry County, Missouri, Circuit Court, which court has criminal jurisdiction for peddling without a license, was tried at the December term, 1872, of said court—pleaded not guilty—admitted the facts charged in the indictment, to-wit: that the plaintiff in error "did unlawfully deal in the selling of goods, wares and merchandise other than books, maps, charts and stationery, by going faom place to place to sell the same, in the selling of sewing machines not the growth or product of this state, without a license first had and procured," but claimed that the law requiring him to procure a license was void.

The court found him guilty and assessed his fine at fifty dollars; whereupon he filed his motions for a new trial and in arrest of judgment, on the ground that the law upon which the indictment was founded unconstitutional and void because in conflict with the provisions of sections 8 and 10 of Article 1, of the Constitution of the United States; which said motions were overruled by the court, from which ruling and decision the plaintiff in error appealed to the supreme

court of Missouri, which is the court of last resort in said state, where, at the January term, 1874, thereof the said judgment of said Circuit Court of Henry county was affirmed (State v. Welton, 55 Mo. 288), whereupon the plaintiff in error duly sued out his writ of error, and the case is now regularly before this court for review.

ASSIGNMENT OF ERROR.

Now comes the plaintiff in error, by his attorney, and assigns the following errors:

I. The Supreme Court of Missouri erred in not reversing said judgment of said Circuit Court of Henry county.

II. The Supreme Court of Missouri erred in affirming said judgment of said Circuit Court of Henry county, and in adjudging the said law of the state of Missouri, relating to pedlers and their licences, to be valid and not in conflict with the constitution of the United States. Whereupon the plaintiff in error prays that the said judgment of the Supreme Court of Missouri be reversed.

BRIEF AND ARGUMENT.

Chapter 106, Wagner's Statutes, and chapter 96, General Statutes of Missouri, upon which the indictment of the plaintiff in error is founded, in plain, express terms imposes a license tax upon any one dealing as therein specified, in goods, wares and merchandise, not the growth, produce or manufacture of said state, while like articles grown, produced or manufactured in said state may be sold in like manner without payment of a license. A man may peddle cigars or clothing produced or manufactured in Missouri

without a license, because, under the law, he is not a pedler; but if he sells precisely the same kind of goods grown, produced or manufactured in Illinois, in precisely the same way, he is, under said law, a pedler, and must take out a license, paying therefor, in the case of the plaintiff in error, twenty dollars to the state and not exceeding forty dollars to the county, for every six months so employed. The law of Missouri, relating to pedlers and their licenses, discriminated in favor of the products of Missouri and against those of other states, and imposes a burden upon foreign products which is not borne by home products. If the state can lawfully impose a license tax on the occupation of selling products not grown or manufactured in the state of twenty to sixty dollars for every six months, it can impose one of one thousand dollars, or so high as to absolutely prohibit the sale of such goods. That this discrimination, now existing under the law of Missouri, is a regulation of commerce, in the light of the numerous decisions of this court and of state courts, is too plain for argument.

See Brown v. Maryland, 12 Wheaton, 419.

Almy v. California, 24 Howard, 169.

Crandall v. Nevada, 6 Wallace, 35.

Woodruff v. Parham, 8 Wallace, 123.

Hinson v. Lott, 8 Wallace, ~~418.~~ 148

Ward v. Maryland, 12 Wallace, ~~148.~~ 418

State v. Scott & North, 27 Mo. 464.

Crow v. State, 14 Mo. 237.

But it is said that this law is no taxation on property at

all, either directly or indirectly. It is simply a tax on a calling or profession. This law falls within the same category as the laws discussed in Brown v. Maryland, Almy v. California and Crandall v. Nevada, above cited. It is an attempt to do indirectly what the constitution of the United States prohibits being down directly. It is an attempt to derive a state revenue from imports. It is fully conceded that a state can tax a profession or occupation as such, but it is denied that a state can, as in the law under consideration, give a forced, special and unusual definition to the word "pedler," and then claim that the law is valid because it applies to all pedlers in the state—to the whole class who follow that occupation. It is claimed that the constitutional prohibitions cannot be evaded by such linguistic legerdemain. As well could the state define a pedler to be one who deals in boots and shoes manufactured in Lynn, or salt produced in Syracuse, and then claim that the tax is uniform on all pedlers, and hence valid.

I had supposed this old claim, that taxing the occupation of the seller was not a tax on the thing sold, and insisted on fifty years ago in this court, had received its final quietus from Chief Justice Marshall, in Brown v. Maryland, above cited, page 444, when he said: "It is impossible to conceal from ourselves that this is varying the form without varying the substance." "As a tax on the occupation of an importer is in like manner a tax on importation. It must add to the price of the article and be paid by the consumer

or by the importer himself, in like manner as a direct duty on the article itself would be," etc., etc.

It is claimed by the plaintiff in error that this law, relating to pedlers, is also in violation of sec. 10, art. 1 of the constitution of the United States, providing that no state shall, without the consent of Congress, lay any imports or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, the net proceeds of which shall be paid into the treasury of the United States.

The constitution here, in the most careful and jealous manner, regulates the right of a state to lay imposts on imports and exports. It can only be done by consent of Congress. It can only be done so far as it is absolutely necessary for executing its inspection laws; and to remove all temptation from a state to abuse even this limited power, it requires the net proceeds to be paid into the treasury of the United States. It is difficult to see the difference in principle between establishing custom-houses on the borders of a state and levying a state tax on imports, and imposing a tax on the sale of imported goods, specially as imports. The burden would be just as heavy on the imported goods, if called a license on selling, as if called a duty on imports, and be equally within the constitutional prohibition; and the most determined supporters of state rights would concede that the state custom-houses would be illegal. Marshall, C. J., in Brown v. Maryland, page 437, says: "A duty on imports, then, is not merely a duty on the act of

importation, but it is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty that is levied while the article is entering the country, but extends to a duty levied after it has entered the country." A state cannot pounce on the imported goods after entering a state and levy a tax on them in the form of a license on the occupation of selling them, specially as imported goods. This would be "varying the form without varying the substance" emphatically. This law of Missouri, relating to pedlers' licenses, being, then, a method of levying an impost on imports, is void unless it complies with the constitutional requirements, but it does not comply in any respect. It is not even claimed that the law has the remotest bearing on inspection laws, or that the net proceeds are paid into the treasury of the United States. It openly and boldly compels imports to pay a revenue to the state under the name of a license tax on selling imported goods in a certain way. The name of the process of levying contributions on imports is of small consequence. If it is only necessary to change the method of reaching the result to evade the carefully drawn constitutional limitations upon inter-state imposts, then the evil of such levies sought to be destroyed by the substitution of the present constitution in place of the old articles of confederation, and which in fact was a leading reason for such substitution, would be restrained by a very feeble barrier.

S. M. SMITH,

One of the Attorneys for Plaintiff in Error.

In the Supreme Court of the United States, October Term, 1875.

M. M. Welton, } Plaintiff in error.
against
The State of Missouri, } Defendant in error.

STATEMENT OF THE CASE.

At the August term, 1872, of the Circuit Court of Henry county, State of Missouri, a court under the laws having criminal jurisdiction, the plaintiff in error was indicted by the grand jury of Henry county, for trading as a peddler without having procured a license therefor. He was properly arraigned before the Circuit Court of said county of Henry at the December term, 1872, and put upon his trial. A plea of not guilty was entered, and by consent of parties the cause submitted to the court, sitting as a jury. The court found the defendant guilty, and assessed his punishment at a fine of fifty dollars. Motions to set aside the verdict and grant a new trial, and in arrest of judgment, were filed, and overruled by the court, and the cause thereupon carried by appeal to the Supreme Court of the State of Missouri.

At the January term, 1874, of the latter, the judgment of the Circuit Court was affirmed, and the case is brought by appeal to this court, for the purpose of revising the judgments of the courts below.

The defendant was indicted under chapter 106, page 279, of Wagner's Missouri Statutes.

The first section of this act, provides that "Whoever shall deal in the selling of patent or other medicines, goods, wares and merchandise, except books, charts, maps and stationery, which are not the growth, produce or manufacture of this State, by going from place to place, to sell the same, is declared to be a peddler."

The second section provides that "No person shall deal as a peddler without a license," and the five next succeeding sections provide in what manner a license may be obtained.

The eighth section declares that "Every person who shall be found dealing as a peddler contrary to law, or the terms of his license, shall forfeit, if a foot peddler, the sum of ten dollars; or one or more beasts of burden, twenty-five dollars; in a cart or other land-carriage, fifty dollars; in a boat or other vessel, one hundred dollars." And the twelfth and last section of the act provides for the punishment of its violation by indictment, etc.

JOINDER IN ERROR.

The respondent for joinder in error denies that the Circuit Court of Henry county committed error in finding the defendant guilty; or in rendering judgment against defendant; or in not sustaining and in overruling the motions for a new trial, and in arrest of judgment.

Respondent further denies that the Supreme Court of Missouri committed error in not revising the judgment of the Circuit Court, or in refusing to adjudge the provisions of law concerning peddlers as not being in conflict with the Constitution of the United States.

JOHN A. HOCKADAY,
Att'y Gen'l of Mo., for Respondent.

RESPONDENT'S BRIEF.

It is insisted by appellant that the act regulating peddlers, already cited, is in conflict with section eighth, article first. of the Constitution of the United States, which provides that Congress shall have power, "to regulate commerce with foreign nations, and among the several States," etc.

This position, we admit, would at once dispose of the case if the act regulating peddlers was susceptible of being construed as providing a system of taxation discriminating prejudicially against articles manufactured beyond the limits of Missouri. But such is not the intent of the act, and its operation cannot to any extent have that effect. (See Mobile vs. Osborne.) The object—16 Wallace—of the enactment, as appears from its title, and from each of its provisions, is simply to regulate a calling or occupation. It is simply an act providing for taxing and licensing peddlers, which the State clearly has a right to do.

In the case of Nathan vs. Louisiana—8 Howard—the right is explicitly declared. Judge McLean, who delivered the opinion, declares "that the right of a State to tax its own citizens for the prosecution of any particular business or profession, within the State, has not been doubted;" see also

Cummings vs. Savannah, R. M. Charlt. 26.
Roquet vs. Wade, 4 Ohio, 114.
Beal vs. State, 4 Blackf., 108.
Austin vs. State, 10 Mo., 593.
Simmons vs. State, 12 Mo., 268.
5 Howard, 588 and 504.
7 Howard, 283.
55 Mo., p. 288.
8 Wallace, p. 123.

The act in question in no respect imposes a tax upon property. It does not prevent, nor does it seek to prevent, the importation of any kind of goods whatever, nor does it impose any conditions upon or place any impediment in the way a free interchange of commodities with other States or countries.

But the doctrine is clearly settled in this country, that the States may even regulate commerce, so long as Congress does not intervene by legislation on that subject. (vide 7, Pet. 221 ; 11 Pet. 102.)

This act does not impose a tax upon property—it simply taxes a *business*, and none the less so because the tax is graded according to the magnitude of that business. If it were a tax upon the goods only, it might be reached if they were found in the hands of the retail merchant. But no such provision is made for such a tax. If the goods are peddled out, the individual or business is taxed, and not the goods. But it is claimed, by appellant's counsel, that the grading of the tax requiring the peddler by steamboat to pay a much larger sum than the foot peddler, is to be construed as making the amount of goods peddled the basis of the tax. It certainly cannot be claimed that the value of the goods constitute the basis, because a foot peddler may carry articles in his knap-sack of much more value than a loaded wagon of common staple goods. The party indicted in this case, it appears, peddled sewing machines, and employed a vehicle to carry them through the country. But it is manifest that he could not carry more than a half dozen at a time, which would not be worth more than three hundred dollars, whilst the foot peddler might carry jewelry, or fancy goods, worth five times that amount, and not pay more than one-fifth of the tax. So it seems that value does not control the tax. But it is the amount or magnitude of the business done, and the facilities of rapid transportation from one point to another. The peddler on horse back or by boat can traverse a State plying his trade, and may make sales amounting to thousands, whilst the footman scarcely gets over a single county in the same length of time, and counts his sales only by tens and fifties. For

this reason the larger operator pays a larger license tax. Any other principle would at once appear manifestly unjust.

The respondent, therefore, insists that it is entirely within the province of the State to license and tax such avocations as its Legislature may see proper to impose, without the least interference with the commercial relations and intercourse between the States. The act of Missouri, regulating peddlers, attempts to do nothing more, and is therefore constitutional and valid. Mobile vs. Osborne, 16 Wall., p. 479.

JNO. A. HOCKADAY,
Att'y Gen'l of Missouri, for ~~Respondent~~ Deft in Error.

A. H. Buckner for Deft in Error